Public Knowledge

November 3, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St SW
Washington, DC 20554

Re: Notice of *Ex Parte* presentation in Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch:

On November 1st, Harold Feld, Senior Vice President, and John Bergmayer, Senior Counsel of Public Knowledge, met with Claude Aiken, Commissioner Clyburn's wireline legal advisor, to discuss issues related to the above-captioned proceeding.

Nature of the Ambiguity

Public Knowledge explained that in determining whether BIAS is a Title I or Title II service, it is important to understand the nature of the ambiguity identified by the Supreme Court in *Brand X.*[1] As the D.C. Circuit and the Commission have both repeatedly acknowledged, the definition of "telecommunications service" was designed to incorporate the test developed by the D.C. Circuit in *NARUC I.*[2] The ambiguity addressed by the FCC was thus extremely limited. Given that the FCC had required common carriers to separate the telecommunications component from the "enhanced" component and offered each separately, how should the FCC treat the offer of a service that combined both a telecommunications service *and* an information service, bundled together. Finding the term "offer" ambiguous, the Court found that the FCC's conclusion that combining the telecommunications component and the enhanced services in a single "offer" could be classified as an information service, rather than as a telecommunications service, was reasonable.

It is important to stress that this was not inconsistent with the existing *NARUC* test. To the contrary, the "holding out" prong of the *NARUC* test. *i.e.*, the offer, was always a case-by-case application. But by codifying the *NARUC* test, including the ambiguity of the word "offer," Congress ratified and froze in place the traditional factors that the FCC used to assess whether a party was genuinely offering to serve the public indifferently. This includes analysis of advertising, and of consumer perception of the service – the factors the Commission relied on in

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[1] *National Cable & Telecommunications Ass'n. v. Brand X Internet Svcs.*, 545 US 967 (2005).

[2] *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976).

the 2015 *Open Internet Order*. Accordingly, in analyzing whether or not the "offer" meets the holding out prong of the *NARUC* test, the commission is constrained to evaluate the same evidence as it has traditionally. To the extent it disregards evidence it has previously found persuasive in the past, such as advertising, it must both *acknowledge* that it is breaking with past practice and *explain* why it chooses to do so.

Finally, the legislative history of the definition makes clear that Congress intended to separate the source of content from the mere moving of bits from one location to another – the function promised by BIAS providers. As the Senate Report on the 1996 Act states that the definition of "telecommunications":

> excludes those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services. ***The underlying transport and switching capabilities on which these interactive services are based, however, are included in the definition of "telecommunications services."*** [3]

As the Commission correctly found in 2015, what BIAS providers offer residential subscribers is "the underlying transport and switching capabilities" rather than the interactive content itself. To the extent this content is stored by content delivery networks (CDNs) or other caching services, that is not the service "offered" by the provider. That is a service purchased by the provider from a third party, such as Akamai, and delivered to the subscriber, at the subscriber's request.[4]

Nature of Congressional Delegation

Public Knowledge also discussed the nature of Congressional delegation. It is frequently argued that Congress could not have foreseen the rise of broadband, and therefore cannot have delegated authority to regulate it to the FCC. This is an astonishing reversal of 80 years of judicial interpretation of the Communications Act, which is precisely to provide for regulatory

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[3] "Telecommunications Competition and Deregulation Act of 1995," Report of the Committee on Commerce, Science and Transportation, Senate Report on S. 652 (1995) at 18 (emphasis added).

[4] To the extent BIAS providers use their own affiliated caching and CDN services, it does not change the equation. What the BIAS provider "offers" in all its advertisements to the public, and what the user perceives she is getting, is delivery of the content requested. This third party *content* is under the control of the third party, and is not part of the service offered by the BIAS provider.

authority over the "dynamic" and changing field of communications by wire or radio.[5] But it is particularly inappropriate with regard to the Telecommunications Act of 1996. It is impossible to imagine that Congress could foresee broadband sufficiently so as to require the FCC to take steps to ensure its timely deployment to all Americans in Section 706, but not for purposes of defining "telecommunications services." Nor is it consistent to argue, as carriers do, that Section 253 delegated authority for the Commission to preempt states with regard to regulation of broadband services, but that somehow Congress suffered a memory lapse when defining "telecommunications" and "telecommunications service" with regard to broadband. If Congress could not have foreseen the evolution of broadband networks when it defined "telecommunications" and "telecommunications services" it certainly could not have foreseen the need for (and therefore delegated authority to allow) the Commission to preempt state regulation of the same "telecommunications services."

Inconsistency with previous FCC Orders

Public Knowledge then discussed how it is notable that the FCC may embark on a path that puts it squarely at odds with its own precedent. Since 2002, the Commission has asserted both its authority and its responsibility with regard to broadband and IP enabled services. As early as 2005, the Commission required Madison River to terminate VOIP calls. As described in Public Knowledge's initial comments, the Commission has repeatedly stressed the importance of protecting consumers of broadband services.

While the Commission has the legal authority to decide to throw consumers to the wolves, it is not free to pretend this is consistent with its previous orders or actions. Embarrassing as it may be for the current Commission, the APA requires – at the least – an acknowledgement of its previous commitment to protect consumers and an explanation as to why it no longer believes it should do so. To pretend in the final Order, as the Commission does in the NPRM, that the Commission never committed to protecting broadband privacy or otherwise protect consumers, is the definition of arbitrary and capricious.

First Amendment

Finally, Public Knowledge explained how it sees the interplay between the First Amendment, the current Open Internet rules, and common carriage more generally. Fundamentally, as the DC Circuit has recently explained, common carriage has never been viewed as infringing on the First Amendment, because common carrier "obligations affect a

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[5] *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157, 173 (1968); *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138 (1940).

common carrier's neutral transmission of *others'* speech, not a common carrier's communication of its own message."[6] While some today seek to challenge this settled understanding—presumably rendering the whole of Title II unconstitutional, including the regulation of telephony—no law supports this radical view.

There does appear to be some confusion as to how the current definition of Broadband Internet Access Service (BIAS) operates and the leeway this gives providers to offer non-BIAS service. For example, EFF and ACLU write that "BIAS providers that go beyond this role of neutral conduit are not subject to Title II classification….The rules pose no problem for such providers as they already create space to make curation an expressive part of their BIAS business model[.]"[7] But this could be more precise: while nothing stops a BIAS provider from *also* offering a non-BIAS service that is not subject to the rules, BIAS itself is always covered by the rules. A provider may not "curate" or "edit" BIAS or otherwise render the rules inapplicable, whether through its communications and marketing or its network management practices. In short, there is an important distinction between services that are outside the scope of the rules, and exceptions or loopholes in the rules.

The Open Internet Order defines BIAS in relevant parts as "A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints…This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part." This definition does not and was not intended to apply to all services that used the Internet Protocol (IP), nor even all mass-market services that make use of internet access in some way. Thus, dedicated, facilities-based IPTV services like U-Verse that are sold separately from broadband service are not included in the definition of BIAS; Amazon's Kindle e-readers that offer free cellular connectivity for accessing its ebook store are not and do not include BIAS;[8] IOT devices that include connectivity of some kind are not covered by the rules; and so on. These are not "exceptions" to the Open Internet rules. These are non-BIAS services that are outside its scope in the same way that cable TV, telephony, and sending letters through the mail are.

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6 *US Telecom Ass'n v. FCC*, 825 F. 3d 674, 740 (DC Cir. 2016).

7 Joint Reply Comments of the American Civil Liberties Union and the Electronic Frontier Foundation (filed August 30, 2017).

8 Customize your Kindle Paperwhite, https://www.amazon.com/oc/configurator/B00OQVZDJM.

The DC Circuit captured this well when it noted that if a provider chose to offer a different kind of service, "for instance, by picking a limited set of websites to carry and offering that service as a curated internet experience," that it would be excluded from the rules.[9] Later, in a concurring opinion[10] denying a rehearing of the Order, Judges Srinivasan and Tatel offer two hypotheticals: one, an ISP offering only access to "family friendly" content, and two, an ISP offering access to some other kind of "edited service." This raises the question of just how similar such a service may be to BIAS.[11] Some have even hypothesized that the mere act of violating the Open Internet rules would be enough to bring a provider out of the definition of BIAS, and thus render the rules inapplicable. But this is plainly false, as again reviewing the definition of BIAS demonstrates. A service that simply blocks access to a few sites or services would still offer access to "substantially all" internet endpoints, and be subject to the rules. And a service that was still the "functional equivalent" of BIAS—perhaps a service that an ordinary user would view as a substitute for BIAS—would still be covered by the rules. Thus a service that offered access *only* to Wikipedia, the New York Times, and FCC.gov might fairly be considered a non-BIAS service, but a service that blocked access to those endpoints would still be BIAS (and in violation of the rules)—even if such blocking were described as "editorial" in nature.

This at least answers the question as far as the Open Internet rules themselves are concerned—a non-BIAS service must be substantially different from BIAS, meaning that there is no "loophole" that allows a BIAS provider to define itself out of the scope of the rules through clever marketing or by blocking access to a handful of sites. It is likely than any service that was sufficiently "edited" to the extent that its provider became a First Amendment speaker would not be recognizably similar to BIAS.

Still, an ISP might attempt to argue that blocking even a single site was expressive, in an attempt to create a constitutional challenge to common carriage. Although this argument is likely

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9 *US Telecom Ass'n v. FCC*, 825 F. 3d 674, 743 (DC Cir. 2016).

10 *US Telecom Ass'n v. FCC*, 855 F.3d 381, 389-92 (2017) (Srinivasan and Tatel, concurring).

11 It is worth bearing in mind that a BIAS provider offering filtering options to a subscriber, including ones that operate at a network level, does not violate the Open Internet rules. Net neutrality always allows users to choose to block certain kinds of sites, and for BIAS providers to offer tools to that effect. The only requirement is that users must be able to make this choice for themselves.

to fail under current precedent,[12] for the sake of argument we can grant the premise. The question then is whether the government can *order* a platform to act as a nondiscriminatory conduit when it can identify a plausibly "expressive" reason why it does not want to do so. This is a more fundamental question than what the Open Internet order does or what the Communications Act necessarily contemplates. Here too, the weight of precedent indicates that the government has this power.

First, as the DC Circuit has found, "legislation has been upheld imposing stringent regulations of various types of entities found to be affected with a public character, even where nothing approaching monopoly power exists."[13] As the court explained, "The common carrier concept appears to have developed as a sort of *quid pro quo* whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business."[14] As applied to ISPs, this would justify treating them as common carriers because offering BIAS has a quasi-public character (because it is used to connect citizens to information and consumers to services, because it is an infrastructure service that creates positive externalities throughout the economy, because it typically uses public rights-of-way and public spectrum, and for other reasons). Because BIAS providers are hardly the first common carriers to involve communications services—telegraph and telephone operators being the most notable historical precedents—it is unlikely that the First Amendment, all along, has rendered this time-tested feature of the common law unconstitutional.

Second, similar principles apply to communications common carriers as have been found to apply to other communications media, such as broadcasting. Broadcasters made the "contention…that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from

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12 *See, e.g.*, *Spence v. Washington*, 418 U.S. 405, 409-10 (1974) (conduct must be "sufficiently imbued with elements of communication" to be covered by the First Amendment).

13 *Nat'l Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

14 Id. 641-42. Not only can the government lawfully direct a business affected with a public interest to operate nondiscriminatorily, it can require that a common carrier continue to serve the public, even when it would rather exit the market entirely. See 47 U.S.C. § 214(a) ("No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby[.]").

using that frequency."[15] However, the court found that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them,"[16] and that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of broadcasters, which is paramount."[17]

The Court reached this conclusion in large part because of the scarcity of spectrum, and of spectrum licenses. A similar rationale applies to BIAS providers, but even more forcefully.[18] In most communities, there are only a limited number of wireline broadband providers—often only one. Wireless broadband competition is also limited. There are usually far more radio and television broadcasters that serve the same area. While spectrum scarcity keeps the number of broadcasters capped, spectrum scarcity, natural monopoly characteristics, and other factors do the same for BIAS. Broadcasters are granted limited licenses by the government to operate; BIAS providers are granted licenses, access to public rights-of-way, poles, and other factors that have a similar effect. It is reasonable to conclude that the speech interests of BIAS subscribers, and their right to access the internet content of their choice, must be paramount.

Nor does the *Red Lion* principle stand alone. Similar considerations have been applied to other private actors, as well—in particular, the public forum doctrine, which usually applies to public property, has been applied to private property as well. In *Marsh v. Alabama*, the Supreme Court found that

> [t]he more an owner, for his advantage, opens up his property to the use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.[19]

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15 *Red Lion Broadcasting v. FCC*, 395 US 367, 386 (1969).

16 Id. 386-87.

17 Id. 390.

18 As for wireless broadband providers, it is not even necessary to analogize; they use the same public airwaves as broadcasters and *Red Lion* is directly applicable.

19 *Marsh v. Alabama*, 326 US 501, 506 (1946).

While the Court has since clarified that private property like shopping malls should not, without more, be considered public fora,[20] later cases uphold the principle that requiring nondiscrimination with respect to others' speech does not infringe on the First Amendment rights of private actors such as BIAS providers. First, in *PruneYard Shopping Center v. Robbins*, the Court held that "neither [private shopping centers'] federally recognized property rights nor their First Amendment rights have been infringed by … [a] decision recognizing a right of appellees to exercise state-protected rights of expression and petition on [private shopping centers'] property."[21] Thus, following *PruneYard*, even if a First Amendment right of BIAS users (or edge providers) to nondiscriminatory BIAS access is not recognized, it does not follow that BIAS providers have a First Amendment right to exclude them, or to otherwise engage in discrimination. If BIAS users are granted state or federal statutory, or state constitutional rights to such nondiscriminatory access, this is enough.

More recently, in *Packingham v. North Carolina*, the Court expanded the public forum doctrine to the internet. It wrote,

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.… While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular.[22]

With this backdrop the Court invalidated a North Carolina statute that prohibited sex offenders from many kinds of internet use. This is not to say that *Packingham* definitively answers every question as to the relationship of the First Amendment to internet access providers or social media platforms, but the the extent the Court rightly exercised caution in its deliberations, it was worried about providing too few, not too many, First Amendment protections to internet users. It wrote,

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20 *See Hudgens v. NLRB*, 424 US 507, 513-21 (1976) (finding that *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 US 308 (1968), which had found a First Amendment right to picket within a private shopping center, had been overruled by *Lloyd Corp. v. Tanner*, 407 US 551 (1972)).

21 447 US 74, 88 (1980).

22 582 US __ (2017) (slip op., at 4-5).

> This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.[23]

Thus, although it was a case involving state action involving its own specific set of facts, *Packingham* signals that the Court is likely to continue to protect the First Amendment rights of internet users.[24]

When viewed in the light of the complex doctrines that have governed the relationship of the rights of speakers, the rights of private platforms, and the ability of the government to promote the common good by ensuring that business affected with a public interest actually serve the public, it is clear that the Open Internet rules, by permitting providers to continue to offer non-BIAS services, goes even further than is constitutionally required to ensure they still have outlets to provide "curated" services of one kind or the other. BIAS is affected with a public interest and is likely a quasi-public forum, and the same doctrines that uphold the regulation of telephones, telegraphs, and broadcasting apply with equal or greater force to broadband. At the same time, the carefully-crafted BIAS definition does not grant leeway to BIAS providers to simply "opt out" of the rules and to offer service that is substantially BIAS, except in name.

Respectfully submitted,

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PUBLIC KNOWLEDGE

November 3, 2017

cc:
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Jay Schwarz
Amy Bender
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[23] Slip op. at 6.

[24] There were no dissents in *Packingham*. Justices Alito, Roberts, and Thomas concurred in the judgment, and Justice Gorsuch did not take part.